Supreme Court, U.S.
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No. 01-789

IN THE

Supreme Court of the United States

NATIONAL TITLE RESOURCES CORP.,

Petitioner,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court should review the decision of the court of appeals, which affirmed summary judgment on the Petitioner's cross-claim for improper termination of an agency contract, where the Petition does not raise any unique issues of federal law or contend that the court of appeals' decision rests on a ruling in conflict with any other circuit or state court of last resort?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

1. *Parties*. Joel M. Holstad ("Holstad") was a party to the underlying action because Respondent Fidelity National Title Insurance Company of New York ("Fidelity") sued him personally on his personal guarantee. The jury, however, did not find Holstad personally liable, and neither Fidelity nor Holstad appealed that finding. Holstad did not personally pursue any cause of action against Fidelity. The counter-claim in this action was brought solely by Petitioner National Title Resources, Inc. ("National"). Indeed, the only relief sought in the Petition for Writ of Certiorari relates to claims that belong to National. Therefore, Petitioners have improperly identified Holstad as a Petitioner.

2. *Statement Pursuant to Rule 29.6*. Fidelity National Title Insurance Company of New York is wholly owned by Fidelity National Financial Inc., a publicly traded company.

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STATEMENT OF THE CASE

For purposes of this Brief in Opposition, Fidelity adopts and incorporates by reference the facts set forth in the reported opinion rendered by the United States Court of Appeals for the Eighth Circuit, decided August 21, 2001, in *Fidelity National Title Ins. Co. of New York v. National Title Resources, Inc.*, 261 F.3d 758 (8th Cir. 2001). Petitioner reprinted that decision in Petitioners' Appendix at A-53. Fidelity also relies upon the findings contained in the unpublished decisions of the district court that Petitioner reproduced commencing at A-1 and A-12. However, because of the peculiar nature of this case and its unusual procedural history, for ease of reference, Fidelity will briefly elaborate on some of those facts.

National acted as Fidelity's agent for purposes of issuing title insurance pursuant to an Issuing Agency Agreement ("Agency Agreement"). The Agency Agreement permitted Fidelity immediately to terminate the relationship upon one or more delineated events of default, including escrow shortages and failure to remit insurance premiums. A-13 – A-14. After Fidelity discovered shortages in National's escrow accounts and National's failure to pay insurance premiums in late 1994 and early 1995, Fidelity sought and received an agreement (the "March Agreement") from National that it would cover those shortages. Nothing in the March Agreement waived or modified any provision of the Agency Agreement. A-49 – A-52; A-26 – A-27; A-8; A-56.

Fidelity ultimately canceled the Agency Agreement, based on National's continued escrow shortages, its refusal to turn over to Fidelity escrow banking responsibilities, and other violations of the Agency Agreement. A-16. Fidelity then sued National to recover escrow shortages, unpaid premiums, and

damages caused by National's negligence in closing several real estate transactions. A-13, A-15 – A-16. National raised various counterclaims including, at issue here, that Fidelity breached the Agency Agreement by terminating it without notice. A-17.

At trial, the jury found by special verdict, A-17, that National breached the Agency Agreement and that it negligently closed several transactions, and awarded Fidelity damages. It also found that Fidelity breached the Agency Agreement and awarded National damages. A-36 – A-42.

Following trial, Fidelity moved for a new trial. The trial court granted Fidelity's motion, concluding that the jury's verdict that Fidelity improperly terminated the Agency Agreement was against the clear weight of the evidence. A-27. It also ruled that the jury's finding that National breached the Agency Agreement compelled a finding that Fidelity had cause to terminate the Agency Agreement. A-24 – A-26. For these reasons, the district court vacated the jury verdict in favor of National and ordered a new trial on National's counterclaim that Fidelity breached the Agency Agreement. For purposes of the new trial, the district court held that Minnesota law limited National's damages to those it incurred, if any, within 30 days of any breach by Fidelity, since either party could terminate the contract upon 30 days' notice to the other. A-29.

During discovery in preparation for the new trial, National disclosed that it did not intend to offer any new evidence not presented at the first trial. A-7. In that trial, National admitted that its escrow accounts contained shortages, that it commingled Fidelity funds with that of its own, and that it owed Fidelity premiums at the time of

termination of the Agency Agreement. *Id.* National also did not dispute the jury's finding that it negligently closed four real estate transactions. *Id.* Fidelity moved for summary judgment, asserting that those undisputed facts demonstrated that it possessed cause to terminate the Agency Agreement as a matter of law. A-6. The trial court agreed, and granted Fidelity's motion. A-1 – A-11.

A panel for the United States Court of Appeals for the Eighth Circuit unanimously affirmed. A-53. It agreed with the trial court that the undisputed evidence produced at trial, along with National's own admissions, provided Fidelity with cause to terminate the Agency Agreement, and, therefore, that Fidelity did not breach the Agency Agreement by terminating it without advance notice. A-56. It also rejected National's assertion that the March Agreement obligated Fidelity to refrain from terminating the Agency Agreement, or waived Fidelity's rights to terminate the Agency Agreement for defaults committed by National. A-56.

RULE 15.2 STATEMENT

Pursuant to Supreme Court Rule 15.2, Fidelity notes the following misstatements made in the Petition.

National states that Fidelity auditor Paul Hunsinger (not "Huntsinger") "ordered the closing of National's escrow account" in late 1994. Petition at 3, *citing* A-2. Hunsinger did not order National to close its escrow account, and the cited reference does not support this assertion.

National claims that the March Agreement was "[a]n agreement . . . between Fidelity and National regarding all allegations of escrow shortages and nonpayment of

premiums." Petition at 3-5. This claim however is merely a legal conclusion urged by National that neither court below elected to adopt.

National also states that Fidelity "admitted, stipulated and agreed that part of the March 29, Agreement was to forego remedies that it might have at that moment, provided that National lived up to the March 29, Agreement." Petition at 9, 10. In support of this assertion, though, National only cites to a sidebar argument of counsel, and the cited provisions do not contain any admission, stipulation, or agreement. *See* A-64 – A-65.

National asserts that "the jury found that only Fidelity committed post March 29 breaches." Brief at 7. The jury did not make any finding concerning such generalized breaches. Rather, it simply found that Fidelity breached the March Agreement, but awarded National no damages. A-38.

Finally, National claims that the jury concluded that Fidelity wrongfully terminated the "*modified* agency agreement." Petition at 13 (emphasis added). This statement, too, is not true. National did not present any evidence to the jury that the parties modified the Agency Agreement, and the jury never even considered whether the parties modified that agreement. A-36 – A-43.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT MEET THE CRITERIA FOR REVIEW BY THIS COURT.

The foregoing account of the proceedings below makes clear that the outcome of this diversity action rested on the lower courts' case-specific examination of the two relevant contracts and the evidence presented at trial. The Petition does not present any compelling issues requiring this Court's review.

The United States Supreme Court has discretion to grant a writ of certiorari when it concludes that "compelling reasons" exist to warrant review. Rules of the Supreme Court, Rule 10. Although not exhaustive, Rule 10 lists a number of considerations governing the grant of a petition for writ of certiorari. Specifically, the Court may decide to undertake review if:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. Petitioner does not assert that any of these considerations exists.

In an effort, however, to transform the court of appeals' narrow ruling into one worthy of this Court's review, the Petition for Certiorari suggests that the decisions below present issues under the Seventh Amendment, and intimates that the lower courts employed improper standards of review. The record does not support those claims.

A. This Case Does Not Present Any Seventh Amendment Issues.

National contends that the district court violated National's Seventh Amendment right to a jury trial by vacating the jury verdict in its favor and ordering a new trial when "ample evidence" existed to support a verdict in its favor on its counterclaim for breach of contract. Petition at 15. In support of this argument, National points to a number of actions which, it argues, constituted breaches

of the Agency Agreement. *Id.* However, none of the "evidence" National claims the jury relied upon in reaching its verdict related to National's counterclaim that Fidelity improperly *terminated* the Agency Agreement. A-26. National limited its counterclaim for breach of the Agency Agreement to Fidelity's supposed improper termination. A-17. Since National has not pointed to any evidence supporting the claim it argued to the jury – its counterclaim for improper *termination* – its Petition has not presented an issue relating to its right to jury trial.[1]

National also contends that the district court violated its Seventh Amendment rights by improperly removing the issue of damages from the jury. It argues that the court found the verdict against the weight of the evidence only after applying an "incorrect legal standard" limiting National's damages to those incurred within 30 days of a breach. Petition at 16. First, National's argument mischaracterizes the trial court's order. The district court ordered a new trial on damages in the first instance because the $566,000 damage award was "not supported by the evidence," A-28, a conclusion independent of the 30-day rule. The district court's order limiting National to 30 days damages was an "alternative ground" for granting a new trial and was based on settled Minnesota damages law. A-28 – A-29. Thus, National's argument does not raise any Seventh Amendment issues. It simply disagrees with a conclusion of law made by the district court and supported by settled Minnesota law – hardly an issue requiring consideration by this Court.

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1. National argues that the Court of Appeals perpetuated this denial of its Seventh Amendment rights by failing to employ the proper standard of review. This argument is addressed in Section I.B.

B. The Courts Below Employed the Proper Standard of Review.

Although tied closely to its pretended Seventh Amendment claim, National also argues that the Court of Appeals employed an improper standard of review and should have employed a more "searching inquiry" of the trial court judgment. Brief at 11. This argument, too, has nothing to do with the Seventh Amendment and merely criticizes the court of appeals' judgment in, at worst, reviewing the trial court's grant of a new trial for abuse of discretion. This is not an issue compelling this court's attention. *See* Supreme Court Rule 10; *see also* 16B CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4004.1 (2d ed. 1996). In advancing this argument, National relies on a single opinion of the D.C. Circuit, *District of Columbia v. Tri County Indus., Inc.*, 200 F.3d 836 (D.C. Cir. 2000). National does not claim that this decision conflicts with any other decisions of the courts of appeals and, indeed, implies that the Eighth Circuit has articulated a similar level of review. Petition at 12. Instead, National asserts that review for abuse of discretion, the standard appellate courts employ when reviewing new trial orders, is "unduly narrow" in the case of a new trial order that vacates a jury verdict. *Id.* However, besides advancing a position contrary to established law, this argument is unpersuasive because this case does not present such an issue.

Appellate courts review orders concerning motions for a new trial for abuse of discretion. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 434, 116 S. Ct. 2211, 2223, 135 L. Ed. 2d 659 (1996) (interpreting appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive); *see also Sanford v. Crittenden*

Mem'l Hosp., 141 F.3d 882, 884 (8th Cir. 1998). Thus, had the Eighth Circuit reviewed the district court's new trial order for abuse of discretion, as National charges it did, it would have been entirely within the bounds of its authority.

However, in this matter, it is clear that the court of appeals employed a much higher standard of review. The district court's order granting Fidelity's motion for new trial and its order granting Fidelity's motion for summary judgment in the second trial are necessarily related, given National's failure to produce any additional evidence in support of its claim in the new trial. Consequently, the court of appeals reviewed the entire decision, both the district court's new trial order and its summary judgment order, *de novo*. A-55. The court neither articulated nor appeared to employ any other standard. National's concern, therefore, that the court of appeals conducted too narrow a review is unfounded. National merely presents an abstract issue not relevant to the proceedings below, and certainly not warranting review by this Court. *See* Supreme Court Rule 10; *see also* 16B CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4004.1 (2d ed. 1996).

Although the Eighth Circuit's apparent *de novo* review of the entire matter below makes this point irrelevant, National's characterization of this Court's holding in *Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 392 (1996) is inaccurate. National cites *Koon* for the proposition that an appellate court must engage in *de novo* review of errors of law. Petition at 16. However, this Court noted in *Koon* that:

> Little turns, however, on whether we label review of this particular question abuse of discretion or *de novo,* for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law. That a departure decision, in an occasional case, may call for a legal determination does not mean, as a consequence, that parts of the review must be labeled *de novo* while other parts are labeled an abuse of discretion. The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.

518 U.S. at 100, 116 S. Ct. at 2047-48 (internal citations omitted). Thus, National's fears that the appellate court would have ignored errors of law had it reviewed for abuse of discretion are unfounded.

National argues that the court of appeals' decision is remarkable for what it did not contain. Petition at 12. Its argument, though, is remarkable for what *it* omits. National suggests that the trial court vacated the jury verdict based solely on the inconsistency of the verdict. *Id.* However, that inconsistency was only one of two independent grounds for the trial court's order. The court's new trial order on the ground that the verdict was contrary to the "great weight of the evidence" stands on its own. A-27. Moreover, National's suggestion that the dissents of Justices Stevens and Marshall in *City of Los Angeles v. Heller*, 475 U.S 796, 106 S. Ct. 1571, 89 L. Ed. 806 (1986) and the First Circuit's opinion in *Skillin v. Kimbal*, 643 F.2d 19, 20 (1st Cir. 1981) required the court of appeals here to employ a more searching inquiry

is not persuasive. First, National never raised the issues those opinions addressed to either court below. Second, neither case dealt with the issue of whether a court of appeals must employ a so-called "more searching inquiry" when reviewing a trial court's grant of new trial. Third, National's argument that somehow Fed. R. Civ. P. 49(a) governing special verdicts like the one returned by the jury in this case has anything to do with the standard the court of appeals must use in reviewing an order for a new trial is not persuasive. One has nothing to do with the other, and none of the cases cited by National connects them. Justice Stevens' dissent, in which Justice Marshall joined, analyzed the four possible responses a trial court may have to an inconsistency in a Rule 49(b) "general" verdict but makes no mention of the appellate standard of review or of a "more searching inquiry." *Skillin* makes a similar analysis, but it, too, fails to address the standard of review advanced by National.

National also argues that the district court violated its Seventh Amendment right to jury trial because the trial court simply disagreed with the verdict. Petition at 14-16. This is rather bizarre given the fact that the trial court, after exhaustive analysis, specifically found that the verdict was against the weight of the evidence, A-23-27.

II. THE COURTS BELOW DECIDED THIS CASE CORRECTLY.

National's chief complaint appears to be that the decisions of the courts below were wrong. However, the courts correctly resolved the issues below.

A. Fidelity Had Cause to Terminate the Agency Agreement.

National's counterclaim against Fidelity alleged that Fidelity breached the Agency Agreement by improperly terminating it without notice or cause. This is the breach National argued to the jury. A-26. However, National did not produce any evidence that Fidelity improperly terminated the agreement. Rather, the uncontroverted evidence at trial demonstrated National's numerous defaults under the Agency Agreement, thus giving Fidelity cause to terminate it. Specifically, National admitted that its accounts contained shortages, that it owed Fidelity premiums it collected from Fidelity insureds, and that it commingled customer and Fidelity funds with its own. A-27, A-49. Thus, the trial court properly vacated the jury verdict finding Fidelity liable for breach of the Agency Agreement.

In discovery for the new trial, National elected to forego any attempt to rectify its deficiencies in proof from the first trial and announced that the evidence it would present on its breach of contract claim would not vary from that it offered at the first trial. A-7. By electing to submit no new evidence in support of its breach of contract claim, National left the district court with an uncontested set of facts demonstrating its defaults under the Agency Agreement, and the court properly found as a matter of law that Fidelity had cause to terminate the Agency Agreement. A-9 – A-10. Based on this record, the court of appeals properly affirmed.

B. The March Agreement Did not Operate to Waive or Modify the Agency Agreement.

National argues that the intent of the parties and whether the March Agreement waived or modified the Agency

Agreement were issues of fact that the court should have reserved for jury trial. Petition at 7-9. However, the construction and effect of a contract raise questions of law that the trial court may determine on summary judgment. *See Opus Corp. v. Intern. Business Machs. Corp.*, 141 F.3d 1261, 1265 (8th Cir. 1998); *see also Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979); *Bell v. Bruen*, 42 U.S. 169 (1843). The Agency Agreement, which provided that Fidelity may terminate it without advance notice upon the event of a default, A-13 – A-14, could not be modified except in writing, A-26. The March Agreement does not contain any mention of a waiver or modification by Fidelity. A-49 – A-51; *see also* A-27, A-8 – A-9, A-56. Therefore, the courts below properly held as a matter of law that the March Agreement did not modify the Agency Agreement.

And although National claims the jury could have inferred a modification or waiver, it never presented evidence that the parties intended to modify the Agency Agreement to the jury, A-27, and the jury did not make any finding on waiver or modification, *see* A-36 – A-42.

C. The District Court Based its New Trial Order on Settled Minnesota Law.

Although National contends that the trial court erred as a matter of law in limiting National's recoverable damages in the new trial to those suffered within 30 days of any breach, Petition at 16, it does not provide any legal support for this assertion. Indeed, it cannot. Under settled Minnesota law, where a contract contains a provision for termination upon notice, recovery of future profits based on a breach of that provision is limited to the specified notice term.

In re Petroleum Carriers Co., 121 F. Supp. 520, 525-27 (D. Minn. 1954); *Western Oil & Fuel Co. v. Kemp*, 245 F.2d 633, 641 (8th Cir. 1957). Since, in this case, either party could terminate the Agency Agreement upon 30 days' notice to the other party, the trial court properly limited National's damages to those it suffered within 30 days of any breach.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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